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Supreme Court, U.S.
FILED
SEP 19 1996
CLERK

No. 96-284

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KIM E. LAUBE, d/b/a
KIM E. LAUBE COMPANY,
Petitioner,

v.

SUNBEAM CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SUNBEAM CORPORATION

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25 pp

RULE 29.6 STATEMENT

Respondent, Sunbeam Corporation, now known as Sunbeam Products, Inc., is a wholly-owned subsidiary of Sunbeam Corporation, formerly known as Sunbeam-Oster Company, Inc. Respondent Sunbeam Corporation (now known as Sunbeam Products, Inc.) does not have any non-wholly-owned subsidiaries.

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BRIEF IN OPPOSITION FOR RESPONDENT SUNBEAM CORPORATION

INTRODUCTION

The Petition for Writ of Certiorari does not present any issue warranting this Court's review. In arguing that the Third Circuit Court of Appeals erred in approving the use of certain hearsay evidence as proof of actual and likely confusion in a trademark infringement case, petitioner Kim E. Laube, d/b/a Kim E. Laube Company ("Laube") takes extraordinary liberties with the facts and ignores the other overwhelming evidence which supported the court's finding that Laube's use of a mark which is virtually identical to Sunbeam's trademark is likely to cause confusion.

Petitioner's argument that there is a conflict within and among the circuits with respect to the admissibility of hearsay evidence to prove actual confusion is fallacious. There is no such conflict. The disparate decisions reached by the various courts that have considered the issue are not the result of any conflict in the law, but rather are simply a reflection of the fact that different factual circumstances lead to different evidentiary rulings.

No two trademark cases are alike. Thus, it would be virtually impossible for this Court to adopt (as Petitioner urges) a single rule to deal with the myriad types of evidence which a trademark infringement plaintiff might offer to show actual confusion. The decision to admit such evidence is more properly left to the trial court which is in a better position to evaluate all of the evidence and balance the competing interests.

Even if the Third Circuit technically erred in allowing Sunbeam to use hearsay evidence to prove actual confusion in this case, the Petition should still be denied because proof of actual confusion was only one of nine factors the court considered in finding a likelihood of confusion between Sunbeam's trademark and Laube's infringing mark. These other factors—which Laube does not challenge in this Court—overwhelmingly demonstrate that Laube's use of Sunbeam's trademark is likely to cause confusion.

STATEMENT OF THE CASE

A. Procedural History

Sunbeam Corporation ("Sunbeam") commenced this trademark infringement action in January 1992 seeking, *inter alia*, a preliminary injunction preclud-

ing Laube from using the mark "A-5" on, or in connection with, the marketing and distribution of professional animal grooming clippers and related products. The A5® mark was coined by Sunbeam [1] more than 30 years ago to market a new product—an electrical animal clipper with detachable blades which snap on and off. Until April 1991, when Laube (a former distributor of Sunbeam's A5® clippers) began marketing "Laube A-5" clippers, Sunbeam's use of the A5® mark had been exclusive. No other animal grooming equipment manufacturer had ever used the A5® mark to identify its clippers or clipper blades.

On March 1-3, 1993, then Magistrate Judge Gary Lancaster held an evidentary hearing on Sunbeam's motion for a preliminary injunction. Judge Lancaster recommended that a preliminary injunction be issued against Laube, finding that Laube chose to use "A-5" on his clippers for the very purpose of associating them with the A5® clippers sold by Sunbeam, and that Laube's use of the A-5 mark was likely to cause confusion. 24a. On June 15, 1993, the district court adopted Judge Lancaster's report and recommendation and preliminarily enjoined Laube from using the A-5 mark.

On May 2, 1994, the Third Circuit Court of Appeals remanded the case solely because it concluded that the magistrate judge had not completely evaluated (by making written finding of fact) the likeli-

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[1] The A5® clippers and clipper blades at issue are marketed under the Oster® name. Sunbeam and Oster were at one time owned by the now-defunct Allegheny International. When Allegheny International emerged from bankrupcy, Sunbeam and Oster became known as Sunbeam-Oster Company, Inc., which later changed its name to Sunbeam Corporation.

hood of confusion factors set forth in *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225 (3d Cir. 1978).

On remand, Magistrate Judge Francis Caiazza (to whom the case had been assigned when Judge Lancaster became a district court judge) carefully considered each of the nine *Scott Paper* factors. 21a-27a. Finding that each and every one of the factors weighed in favor of Sunbeam, Magistrate Judge Caiazza recommended that the preliminary injunction be reinstated against Laube. 27a-28a. The district court judge adopted this recommendation, and its order was affirmed on appeal. 3a-4a. On May 23, 1996, the Third Circuit denied Laube's petition for rehearing. 1a-2a.

B. Evidence Presented At The Preliminary Injunction Hearing

1. *Sunbeam's Use of A5® as a Trademark*

In 1962, Sunbeam coined the designation "A5" for its new clippers.[2] The "A" and the "5" do not refer to any characteristic or feature of the clipper. Sunbeam arbitrarily chose them to market the clipper. Sunbeam also manufactures A5® blades to be used in connection with its A5® clippers.

For the past 30 years, Sunbeam has continuously and exclusively used the trademark A5® (and since 1984 the trademark Golden A5®) in connection with

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[2] In 1993, the United States Patent & Trademark Office ("PTO") issued a certificate of registration to Sunbeam for the trademark A5®. Despite having an opportunity to do so, Laube did not file any opposition to Sunbeam's registration of the A5® mark. The trademark Golden A5® was registered by the PTO on September 1, 1992. Likewise, no opposition to this mark was pursued by Laube.

its manufacture and sale of animal clippers and clipper blades. Sunbeam's competitors in the animal grooming industry manufacture detachable blade clippers, and in some instances accompanying blades, however, they do not refer to their clippers or their blades as either "A5" or "A-5". In fact, until Laube began marketing his A-5 clipper, no other animal grooming equipment manufacture had ever used the designation "A5" to identify its clippers or clipper blades.

Sunbeam advertises and promotes its A5® clippers and blades in a variety of ways, including placing ads in various trade magazines, using "co-op" advertisements and distributing product catalogs. Over the years, Sunbeam has spent in excess of $1 million to advertise and promote its A5® and Golden A5® clippers and blades.

Sunbeam, via its nationwide sales force, sells its A5® clippers and A5® blades to catalog distributors, regular distributors, veterinarians, pet grooming professionals and retail chain stores which sell directly to consumers. Sunbeam's primary sales of A5® clippers and blades are through catalog distributors.

As a result of Sunbeam's continuous and exclusive use and promotion of the A5® mark to identify its clippers and clipper blades, individuals in the pet grooming industry have come to associate A5® with Sunbeam and only Sunbeam.

2. *Kim Laube and the Laube A-5 Clipper*

Laube has been in the animal grooming business since 1972, when he first began sharpening and repairing clippers and clipper blades in the San Diego, California area. During the 1980's, Laube was an

authorized distributor of Sunbeam's pet grooming products, including Sunbeam's A5® clippers and blades. Sunbeam terminated Laube's distributorship when, in contravention of his distributorship agreement, Laube began selling competitors' clipper products.

In April 1991, Laube appeared at a trade show in New Jersey with a cordless animal clipper which he referred to as the "Laube A-5". At the time Laube selected this name for his clipper, he was admittedly aware of Sunbeam's use of A5® to identify its clippers and clipper blades. Laube neither sought, nor received, Sunbeam's permission to use the A5® mark on his clippers. In May 1993, while these proceedings were ongoing, Laube began marketing and distributing a new product—"Laube A-5" blades.

Laube's clipper is available in five colors, including black. Laube advertises his clipper through his own promotional material, as well as through "co-op" advertisements. Sunbeam's A5® clipper and Laube's A-5 clipper frequently appear side by side in these co-op advertisements. Laube also promotes his clipper at trade shows around the country.

3. *Confusion Regarding the Laube A-5 Clipper*

Shortly after Laube began marketing and distributing his A-5 clipper, Sunbeam sales representatives began to receive inquiries from customers requesting information about, or seeking to purchase, Laube's clippers from Sunbeam.

Richard Sporing, one of Sunbeam's district sales managers, testified that in September 1991 he attended the Groom-Expo show in Hershey, Pennsylvania. At this trade show, several people approached

Sporing and asked to see Sunbeam's "new clipper that comes in different colors and has a battery pack." Sunbeam does not make a cordless clipper with a battery pack, and its A5® clippers are only available in black and burgundy.

In March 1992, Sporing attended a grooming seminar in Pittsburgh and was again approached by people asking to see Sunbeam's "new" clipper, which they described as having a battery pack and being available in different colors. Sporing testified that these customers specifically indicated to him that they were confused as to the source of Laube's clipper because it was called the "Laube A-5" clipper.

Shortly after this Pittsburgh seminar, Sporing received a telephone call from the buyer for Pennsylvania Veterinary Supply ("PVS"), one of Sporing's 20 largest accounts. The buyer for PVS, who had apparently seen the Laube A-5 clipper at a trade show in San Diego, requested information about the product number, price and other aspects of the clipper and expressed an interest in ordering it for distribution.

In addition to Sporing's testimony regarding instances of confusion, Sunbeam also offered into evidence several inter-company memoranda which Sunbeam's vice president of sales and marketing had received from the sales force. These memoranda described the following incidents:

- Sunbeam's district sales manager in Florida noted that a customer at a trade show tried to order a Laube clipper from Sunbeam, and another customer requested that Sunbeam send him parts for his Laube clipper.
- Sunbeam's district sales manager in the Pacific Northwest recounted an incident at a trade

show where a customer asked to see Sunbeam's cordless clipper. The manager showed the customer Sunbeam's Model 125-10 Pro Cord/Cordless product, at which point the customer replied, "No, I mean your large pink clipper with removable blades." The manager was approached at another trade show by a customer asking to see the Kim Laube A-5.

- Sunbeam's district sales manager in Tennessee reported that the manager of Sunbeam's authorized service center in Memphis called to inquire about the new model A5 with the Laube name on it, because he had received one for blade fitting.
- Sunbeam's district sales manager in California reported that she had received a call from a distributor needing to order parts for "our cordless A5." The distributor had assumed the clipper was Sunbeam's because it said A-5.
- Sunbeam's California sales manager also reported that at the July 1992 WWPSA trade show, 5 to 10 groomers had approached Sunbeam's booth looking for "that bright colored A5"; "your pink rechargeable"; "your Laube clipper."

Finally, Sunbeam offered evidence of actual confusion through the testimony of Ken Turner, who works for a clipper repair company in Philadelphia. Turner's company is an authorized repair service center for Sunbeam clippers. The company does not repair Laube clippers and has no affiliation with Laube. Turner testified that in the year preceding the injunction hearing, he had received two Laube clippers for repair. Turner testified that he had received the clippers because they were still under warranty and the customers wanted them repaired at no charge.

REASONS FOR DENYING THE WRIT

I. BECAUSE LAUBE FAILED TO TIMELY OBJECT TO KEN TURNER'S TESTIMONY REGARDING RETURNED CLIPPERS, HE HAS WAIVED HIS RIGHT TO CHALLENGE THIS TESTIMONY ON APPEAL

As noted earlier, Sunbeam offered the testimony of Ken Turner to show that there had been actual confusion among consumers as a result of Laube having used Sunbeam's A5® trademark in the name of his clippers. Turner testified that the authorized Sunbeam repair center at which he works had received two Laube A-5 clippers for repair within the year preceding the injunction hearing. The clippers had been sent to the repair center because they were still under warranty and the customers wanted them repaired at no charge.

At no time during Mr. Turner's testimony did counsel for Laube object to the purportedly hearsay nature of such testimony. In fact, counsel for Laube failed to object to the admissibility of Mr. Turner's testimony on any grounds.

Hearsay objections must be raised at the time the allegedly objectionable testimony is offered at trial. *See, e.g., Morris v. U.S. Dept. of Treasury, I.R.S.*, 813 F.2d 343, 347 (11th Cir. 1987) (Party "bound by answers that are hearsay, if not objected to."). Such objections cannot be raised for the first time on appeal. *See Harris Market Research v. Marshall Marketing*, 948 F.2d 1518, 1525 (10th Cir. 1991) (court in copyright infringement case refused to consider issue of whether exhibits offered by plaintiff constituted inadmissible hearsay because this objection was raised for the first time on appeal). Because

Laube failed to object to Mr. Turner's testimony at the time it was offered, he has waived his right to raise this issue on appeal. Accordingly, the only remaining issue is whether the Third Circuit's approval of the district court's use of Mr. Sporing's testimony and the inter-office memoranda to prove actual confusion is in conflict with other decisions of the Third Circuit or other courts of appeal.

II. BECAUSE THE ADMISSIBILITY OR EXCLUSION OF HEARSAY EVIDENCE TO PROVE ACTUAL CONFUSION NECESSARILY TURNS UPON THE PARTICULAR FACTS OF THE CASE PRESENTED, NO SPLIT EXISTS WITHIN OR AMONGST THE CIRCUITS REGARDING THE USE OF SUCH EVIDENCE

Petitioner would have this Court believe that two competing rules of law have developed within and amongst the circuits regarding the use of hearsay evidence to prove actual confusion. Petitioner urges this Court to grant certiorari to resolve this "conflict." Not only is there no conflict, but there are not even two competing rules of law. The decisions which various courts have reached have been guided by and dependent upon the particular facts of each case. In fact, it would be almost impossible (and certainly inadvisable) to create a single rule to deal with the myriad evidentiary issues faced by a court in a trademark infringement action. The admissibility of different types of evidence is best left to the trial judge who is in a better position to determine—under the totality of the circumstances—whether, and to what extent, such evidence proves actual confusion.

A. The Third Circuit's Decision in *Versa Products*

Petitioner argues that the Third Circuit's decision in this case conflicts with the Third Circuit's earlier decision in *Versa Products Co., Inc. v. Bifold Co. (Mfg.) Ltd.*, 50 F.3d 189 (3d Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 54 (1995).[3] The decision to reject plaintiff's hearsay evidence in *Versa*, while allowing it in this case was dictated by the disparate nature of the infringement claims at issue, and the quality and relevance of the evidence presented. There is no conflict.

At issue in *Versa* was whether defendant had infringed the *product configuration* of plaintiff's directional control valve. In reversing the district court's issuance of a permanent injunction, the Third Circuit repeatedly noted that many of the principles and rules of law applicable to traditional *trademark* infringement cases, including application of the *Scott Paper* factors, were not relevant, "because of policy considerations applicable [only] in product configuration cases." 50 F.3d at 193. The court went on to note that, "the law of trade dress in product configuration will differ in key respects from the law of trademarks. . . ." *Id.* at 202.

Having established these case specific guidelines, the Third Circuit in *Versa* proceeded to reject a majority of the findings of fact and conclusions of law made by the district court. Without discussion (or

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[3] Petitioner made a similar argument in asking the Third Circuit for a rehearing *en banc*. The Third Circuit apparently did not believe that there was such a conflict, denying the petition for rehearing. 1a-2a. Significantly, Judge Becker, who authored the *Versa* opinion was on the panel that rejected Laube's appeal.

any indication as to whether its holding was to be expanded beyond product configuration cases), the Third Circuit held that the district court had "erred in relying on hearsay evidence for the proposition that there was actual confusion." *Id.* at 212. The hearsay evidence at issue consisted of testimony by plaintiff's vice president that he had been advised by plaintiff's European sales manager that "there was confusion at trade shows" because plaintiff's and defendant's valves resembled one another. *Id.* Plaintiff also offered the testimony of a sales manager regarding conversations between the manager and two trade show attendees "regarding the issue of confusion." *Id.*

The Third Circuit's holding that the district court had erred in relying on such evidence to prove actual confusion was prompted as much by the irrelevance and unreliability of such evidence, as by the fact that it was hearsay:

> Vetter [plaintiff's vice president] could not even identify the people allegedly confused, instead referring [defendant's] attorney to 'the brief.' Moreover, Vetter's response only proves that people thought the valves' appearances were similar, not that they were actually confused by the similar appearances.

50 F.3d at 212.[4]

In contrast, the evidence Sunbeam offered here was (as two different magistrate judges found) credible

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[4] That the Third Circuit did not intend to create an all-encompassing rule excluding the use of hearsay evidence to prove actual confusion is reflected in its comment that a fax mistakenly sent to plaintiff asking for a quote on defendant's valves "would suggest confusion." 50 F.3d at 212 n.17.

and reliable, and spoke directly to the issue at hand, *i.e.*, whether Laube's use of Sunbeam's A5® mark is likely to cause confusion. 25a-26a. Sunbeam's district sales manager recounted a number of instances in which he had been approached by customers either inquiring about, or seeking to purchase, Laube's clipper from Sunbeam. These customers expressly indicated that they had assumed Laube was associated with Sunbeam because of his use of the A-5 designation. Sunbeam also offered a series of memoranda in which other Sunbeam sales representatives indicated that they too had received numerous inquiries regarding Laube's A-5 clipper.

In light of this overwhelming evidence of confusion, and the fact that a trademark rather than a product configuration was at issue, it is not surprising that the Third Circuit in this case affirmed the district court's acceptance of such evidence as proof of actual confusion. The disparate decisions in this case and the *Versa* case are not the result of a conflict in the law of the Third Circuit but rather an acknowledgement that the facts and circumstances mandated different results.

B. Decisions From Other Circuits

Petitioner's argument that there is a conflict among the various circuits is likewise without merit. In fact, the issue as expressed by the majority of other circuits is not whether hearsay evidence should be admitted but rather, once admitted, how much weight should be given to such evidence under the circumstances. *Compare Duluth News-Tribune v. Mesabi Pub. Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996) (evidence of misdirected mail and phone calls found to be *de minimis* "and to show inattentiveness on the

part of the caller or sender rather than actual confusion") and *International Kennel Club v. Mighty Star, Inc.*, 846 F.2d 1079, 1090 (7th Cir. 1988) (letters, phone calls and inquiries received by plaintiff regarding defendant's product "constitute probative evidence of a likelihood of confusion").

Those few courts which have excluded evidence of actual confusion as hearsay have done so because of a deficiency in the evidence presented, not because a general rule of exclusion mandated such a result. *See, e.g., Smith Fiberglass Products, Inc. v. Ameron, Inc.*, 7 F.3d 1327, 1331 (7th Cir. 1993) (lack of an exact quote and the identity of the customer making the statement to plaintiff's employee precluded a finding that such evidence fell under an exception to the hearsay rule); *Vitek Systems, Inc. v. Abbott Laboratories*, 675 F.2d 190, 193-94 (8th Cir. 1982) (court permitted plaintiffs' employees to testify as to instances of customer confusion, but refused to admit employee's memorandum of a meeting with a customer).

As indicated earlier, such disparate holdings are not the result of any conflict within or among the circuits. These holdings merely reflect the fact that different factual circumstances will lead to different evidentiary rulings. There is no conflict with respect to legal principles and holdings which would warrant this Court's attention. As it is not this Court's function to serve as either a fact finder or a reviewer of evidence, Petitioner's writ should be denied. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("[B]oth courts below having agreed on the facts, we are not inclined to examine the record for ourselves. . . ."); *United States v. Johnston*, 268 U.S.

220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

III. ASSUMING, ARGUENDO, THAT THE THIRD CIRCUIT TECHNICALLY ERRED IN APPROVING THE USE OF CERTAIN HEARSAY EVIDENCE AS PROOF OF ACTUAL CONFUSION, THIS ERROR WAS HARMLESS BECAUSE EVALUATION OF THE OTHER *SCOTT PAPER* FACTORS OVERWHELMINGLY DEMONSTRATED A LIKELIHOOD OF CONFUSION

In *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225 (3d Cir. 1978), the Third Circuit enumerated a number of factors to be considered by a court in determining whether a trademark plaintiff has demonstrated a likelihood of confusion. Those factors include:

(1) the degree of similarity between the marks;

(2) the strength of the owner's mark;

(3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;

(4) the length of time the defendant has used the mark without evidence of actual confusion;

(5) the intent of the defendant in adopting the mark;

(6) evidence of actual confusion;

(7) whether the goods are marketed through the same channels of trade and advertised through the same media;

(8) the extent to which the targets of the parties' sales efforts are the same; and

(9) the relationship of the goods in the minds of the public because of the similarity of function.

589 F.2d at 1229.

Not all of these factors are entitled to the same weight, and a plaintiff need not prove each and every element to prevail on its claim for trademark infringement. *Fisons Horticulture, Inc. v. Vigoro Industries, Inc.*, 30 F.3d 466, 476 n.11 (3d Cir. 1994) ("[W]eight given to each factor in the overall picture, as well as its weighing for plaintiff or defendant, must be done on an individual fact-specific basis."). In fact, a plaintiff need not even show actual confusion if there is sufficient evidence of a likelihood of confusion. *Id.* at 476; *see also Country Floors v. Partnership of Gepner & Ford*, 930 F.2d 1056, 1064 (3d Cir. 1991).

Assuming, *arguendo*, that the Third Circuit erred in considering as evidence of actual confusion the hearsay evidence [5] offered by Sunbeam, such error was harmless because evaluation of the other *Scott Paper* factors overwhelmingly demonstrated a likelihood of confusion.

A. Similarity of the Marks

Similarity of the plaintiff's and defendant's marks is the "first and *primary* factor" to be considered in the likelihood of confusion inquiry. *Versa Products, supra*, 50 F.3d at 202 (emphasis added); *see also Fisons Horticulture, Inc. v. Vigoro Industries, Inc.*,

[5] Sunbeam disputes Petitioner's contention that the testimony and other evidence which Sunbeam presented at the injunction hearing constitutes hearsay. For purposes of this proceeding, however, it is not necessary for this Court to resolve this dispute.

30 F.3d 466, 472 (3d Cir. 1994) ("Where [as here] the trademark owner and the alleged infringer deal in competing goods or services, the court need rarely look beyond the mark itself. The court focuses on the marks to determine whether they are confusingly similar." (Citations omitted)).

Here, the mark used by Laube (*i.e.*, A-5) is virtually identical to Sunbeam's A5® mark. Although Laube includes his name as a prefix to the A-5 mark, the dominant feature of the mark is the "A" and the "5". 21a. As the district court noted, "Confusion is the normal result when the dominant features of the two marks are identical." 21a.

B. Strength of the Marks

In evaluating the strength of a particular mark, courts divide trademarks into four categories: (1) arbitrary or fanciful; (2) suggestive; (3) descriptive; and (4) generic. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Fanciful marks "consist of coined words which have been invented for the sole purpose of functioning as a trademark." *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 292, n.18 (3d Cir. 1991), *cert. denied sub nom. Altran Corp. v. Ford Motor Co.*, 502 U.S. 939 (1991) (citations omitted). Such marks are considered to be "strong" marks, automatically qualifying for trademark protection. *See, e.g., Berner Intern. Corp. v. Mars Sales Co.*, 987 F.2d 975, 979 (3d Cir. 1993); *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1179 (9th Cir. 1988).

As indicated earlier, A5® was coined by Sunbeam more than 30 years ago to market a new clipper. Accordingly, it is a strong mark. In addition, the dis-

trict court found that "the grooming industry relates the 'A5' mark with the Sunbeam product." 22a.

C. Price of Goods/Care and Attention of Purchasers

Laube's clippers retail for $99.99; Sunbeam's clippers retail for $92.42. As noted by the district court:

> When viewed in the context of the likelihood of confusion, the similarity of the cost of the Laube and the Sunbeam clippers serves to mislead an appreciable number of ordinary prudent purchasers as to the source of the product, especially when this factor is considered in conjunction with the likeness of the mark now utilized by the plaintiff and the defendant.

23a. [footnote omitted].

D. Length of Time Without Actual Confusion

The district court found that shortly after Laube introduced his Laube A-5 clipper, a Sunbeam service center received a pair of Laube clippers for repair.[6] The fact that a defendant's products are sent to plaintiff for repair constitutes evidence of actual confusion. *See, e.g., Ford Motor Co., supra*, 930 F.2d at 300; *Westward Co. v. Gem Products, Inc.*, 570 F. Supp. 943, 950 (E.D. Mi. 1983).

B. Laube's Intent

Laube, as a former distributor of Sunbeam's A5® clippers, was subjectively aware of Sunbeam's use of the A5® mark. 24a. In fact, the magistrate judge who presided over the original injunction hearing

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[6] As indicated above, Laube's counsel failed to object to this testimony at the time it was offered. Accordingly, Laube has waived his right to object to the Court's consideration of this evidence.

concluded that Laube had used the A-5 designation for the sole purpose of associating it with Sunbeam's A5® clipper. 24a. On remand, the new magistrate judge came to the same conclusion. 25a. ("Laube's use of the 'A-5' mark is strongly suggestive of his intention to draw from [Sunbeam's A5®] mark.")

F. Actual Confusion

As indicated earlier, evidence that a defendant's products have been returned to the plaintiff for repair constitutes strong proof of actual confusion. Thus, even if this Court rejects Sunbeam's other evidence of actual confusion, Sunbeam has still offered this proof of actual confusion.[7]

G. Marketing Channels

The district court found that Sunbeam and Laube solicit business in the same manner, *i.e.*, through the use of trade publications, catalogs, brochures and appearances at trade shows. 27a.

H. Targets of the Parties' Sales Efforts

Here too, the district court found a substantial overlap in the markets targeted by Sunbeam and Laube. They both reach distributors, veterinarians, professional groomers and consumers. 27a.

I. Similarity of Function

As the district court noted, "[a]side from the fact that the Laube clipper is cordless, [Sunbeam's] 'A5'

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[7] Petitioner complains that the district court failed to properly consider the survey evidence which he presented to show an alleged lack of confusion. The district court properly refused to accord the survey significant weight because the survey failed to consider possible confusion among the relevant class of purchasers. 26a.

clipper performs the same function as the Laube 'A-5' clipper." 27a.

An analysis of the *Scott Paper* factors led the district court to conclude that they "aptly indicate a likelihood of confusion." 27a. Of significant importance to the district court was the similarity of the marks, the strength of Sunbeam's mark, Laube's intent and the brief interval of time which elapsed between the introduction of the Laube A-5 clipper and the subsequent return of a Laube clipper to a Sunbeam repair center. 27a. None of these findings is challenged by Laube in his Petition. Accordingly, any error by the Third Circuit in accepting Sunbeam's allegedly hearsay evidence as proof of actual confusion was harmless.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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